

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
240-777-6600

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Case No. A-6205

**APPEAL OF RANDOLPH BUILDINGS LIMITED PARTNERSHIP
BY ALLEN R. KRONSTADT**

OPINION OF THE BOARD

(Hearing held May 30, 2007)
(Effective Date of Opinion: August 23, 2007)

Case No. A-6205 is an administrative appeal filed by Allen R. Kronstadt on behalf of Randolph Buildings Limited Partnership (collectively referred to as the "Appellant"). The Appellant charges administrative error on the part of the County's Department of Permitting Services ("DPS") in issuing its Notice of Violation, dated January 30, 2007, which determined that Appellant was operating an animal boarding place outdoors by allowing dogs outside of the soundproofed building, in violation of Section 59-C-5.21 of the Zoning Ordinance. Appellant was instructed to cease and desist animal boarding use outside of the building. The subject property is located at 4920 Wyaconda Road, Rockville, Maryland 20852 (the "Property"), in the I-4 zone.

Pursuant to Section 59-A-4.4 of the Montgomery County Zoning Ordinance, codified as Chapter 59 of the Montgomery County Code (the "Zoning Ordinance"), the Board held a public hearing on the appeal on May 30, 2007. Ronald M. Bolt, Esquire, and Beth Irving, Esquire, represented the Appellant. Assistant County Attorney Malcolm Spicer represented DPS. Barbara Piczak testified on behalf of DPS. Michael Schlegel testified on behalf of the Appellant. Richard and Christine Fischman, and John Rowe, neighboring property owners, intervened. Richard Fischman testified at the hearing.

Decision of the Board: Administrative appeal **denied**.

FINDINGS OF FACT

The Board finds by a preponderance of the evidence that:

1. The subject Property is located at 4920 Wyaconda Road, Rockville, Maryland, 20952 (Parcel 12, Plat 18983, Randolph Hills Section 2) in the I-4 zone. Happy Tails Dog Spa, LLC, dba Dogtopia, is operating at the subject Property.
2. Ms. Barbara Piczak testified for the Department of Permitting Services. She has been a zoning inspector with DPS for over five years. She testified that the Property has a valid Use and Occupancy permit for an animal boarding place. See Exhibit 7, page 4. She testified that DPS received the first telephone call complaining about dogs barking on January 2, 2007, and that she went out that afternoon to inspect the Property. She stated that she found six dogs outside on that day, and that the building doors were open so that the dogs could come and go freely.

Ms. Piczak testified that she followed up on her findings the next day, speaking with Joye Novellino of Dogtopia about the dogs being outdoors.¹ She testified that she advised Ms. Novellino that pursuant to Section 59-C-5.21(e) of the Zoning Ordinance, an animal boarding place is a permitted use in the I-4 zone, but that footnote 11 to that section states that the use is permitted when in a building insulated sufficiently to control noise.² See Exhibit 9, pages 9-11. Because of that footnote, Ms. Piczak testified that she had concluded that an outdoor dog exercise area is not permitted in connection with an animal boarding place in the I-4 zone. She stated that the building was soundproofed, but that the outdoors is not. She testified that she issued the January 30, 2007, Notice of Violation because of dogs outside of the building. See Exhibit 3.

On cross-examination, Ms. Piczak testified that she deals primarily with special exception properties, and that this was the first time she had issued a Notice of Violation for an outdoor dog exercise area in an industrial zone. She further testified that she issued the Notice based on her read of the Zoning Ordinance and after consultation with others at DPS, but that DPS does not have written guidance on this topic. She also agreed with Mr. Bolt that footnote 11 requires sufficient insulation to soundproof the building.

¹ Ms. Piczak testified that she also spoke to Ms. Novellino about the dogs' fence encroaching on adjoining property which is zoned R-60 and has a special exception for parking for 4920 Wyaconda Road. The issue of the fence is not material to this administrative appeal, and so is not addressed in this Opinion, though it was discussed at some length during the hearing.

² Footnote 11 to Section 59-C-5.21(e) reads as follows: "11 When in a building that is insulated sufficiently to prevent interior noise from reaching any neighboring use."

In response to Board questions, Ms. Piczak agreed that it is not unusual to have animal boarding places housed completely indoors.

3. Counsel for DPS stated in response to a question from the Intervenor that in other zones, outdoor exercise runs are allowed, at least by special exception.
4. Intervenor Richard Fischman testified that most of his case is contained in his letter (exhibit 8). He stated that he lives nearby, and that he became aware of the boarding use when a dog owner came by seeking a lost dog. He testified that the building was previously used as a furniture display house. He testified that with a radius of two miles, there were many other dog boarding facilities, and that none have outdoor facilities that he is aware of, but that owners of boarded pets can pay extra to have their dogs walked outside.

Mr. Fischman stated that there is a limit to the ability of DPS and animal control to enforce animal-related regulations. He stated that it is difficult for citizens to get a response to their complaints.

Mr. Fischman testified that he spoke with an attendant at the subject boarding place, and that any movement caused the dogs to bark. He testified that after the Notice of Violation was issued, on one occasion his wife was in their back yard and commented on the dog noise. He stated that he climbed to the top of the railroad tracks and noticed that the windows of the boarding facility were open. He stated that he was not confident in the ability of Dogtopia to comply with the law.

On cross examination, Mr. Fischman acknowledged that two of the nearby boarding facilities he mentioned were veterinary clinics, and testified that the others were located in commercial areas. He stated that he last visited the subject Property in February, and that there were no dogs outside at that time.

Mr. Fischman stated his belief that the noise of the train is not comparable to the noise of the barking dogs, or to a violation of the Zoning Ordinance. He stated that the outdoor exercise facility affects the surrounding area, and that he would be disappointed to see this use continue.

5. Mr. Michael Schlegel, one of the owners of Dogtopia and Vice President for Franchise Development, testified for the Appellant. He stated that Dogtopia is a franchise company with 12 locations, and that he handles real estate construction for the various sites. He stated that he has 6 years in the business and owns 2 corporate offices. He stated that all of his franchise locations have outdoor exercise areas. He testified that the facility at the

subject Property is the only Dogtopia location in Montgomery County, and that they were opening a Howard County location.

Mr. Schlegel testified that the outdoor exercise areas let the dogs stretch their legs, go in kiddie pools, and get sun. He testified that the dogs are never outside for more than 20 or 30 minutes, and that their time outside enables Dogtopia staff to clean out the space and keep it sanitary. He stated that they use the outdoor dog exercise areas three or four times a day, for an aggregate time of two or three hours. He testified that while the dogs used to go out for the first time at 6:30 a.m. and for the last time at 7:00 p.m., they now only go out between 9:00 a.m. and 5:00 p.m. He testified that the dogs are divided by size and temper, and that usually 10 to 12 dogs are allowed out at one time (in any event, no more than 15). He testified that the dogs are always supervised when they're together to ensure that there is no fighting. He stated that this also controls their tendency to bark. He testified that they bring the dogs that tend to bark inside, that they keep a list of "barkers," and that those dogs are not allowed outside. He also testified that they also use a "dog silencer" for repeated barking.

Mr. Schlegel testified that Dogtopia did stop keeping the doors open. He testified that Dogtopia does not offer dog walking because of liability. He stated that the dogs boarded at Dogtopia are evaluated up front for temperament, and to ensure that their vaccinations are up to date.

Mr. Schlegel testified that the maximum number of dogs the facility can take is about 100 dogs. He testified on cross-examination that he averages 30 or 40 dogs per day, and that the demand for both daycare and boarding is seasonal. He stated on cross-examination that while he didn't know the exact number of dogs boarded at the time the first complaint was filed, the Christmas/New Year's holidays are one their busiest times for boarding.

Mr. Schlegel testified that the building is 25,000 square feet, and that Dogtopia occupies approximately 10,000 square feet upstairs, and 10,000 square feet downstairs. He stated that the corporate headquarters for his company is located at the subject Property, and that less than 8,000 square feet is dedicated to the dogs. He stated that the facility meets all County licensing requirements. On cross examination, he testified that the facility contains three indoor exercise areas for the dogs, about 2,500 square feet each. He further testified on cross-examination that the dogs are only crated at night, which allows for cleaning of the indoor exercise area. He testified that adult dogs are fed twice a day, in their crates, and that puppies are fed three times a day. He testified that the space is fully conditioned.

Mr. Schlegel testified on direct examination that his competitors have an outside play area for the dogs, and that owners expect that. He testified that

Ana's Ark Doggie Depot, A Pleasant Groom' N Inn, and Pet Dominion are nearby animal boarding places that have outdoor exercise areas. See Exhibit 9 at pages 19-20. He testified that he thought that the first two were located in the I-1 zone, but said that they may be in an I-1 zone in the City of Rockville, and testified that he thought Pet Dominion was in a transit-oriented zone.³ He stated that he had gone to DPS for a fence permit, that it was clear that the fence was to be used to contain the dogs outside, and that never once did anyone from DPS say that such a use was not allowed.⁴

Mr. Schlegel testified that the subject Property adjoins a railroad track, that the tracks are approximately 50 feet from the yard, that trains pass by every 15 minutes, and that the trains are louder than barking dogs. He stated that he cannot conduct business with open windows when a train goes by because it is so loud. He further testified that the trains do not cause the dogs to bark.

In response to questions from Intervenor Fischman, Mr. Schlegel testified that he carefully researched the zoning of the Property prior to locating his business there by contacting the County, going to Park and Planning to see the Zoning Vicinity Map, and looking at the Zoning Ordinance on-line.

6. Appellant timely filed this appeal to the Board of Appeals.

SUMMARY OF ARGUMENTS

1. Mr. Malcolm Spicer argued on behalf of DPS. Mr. Spicer argued that the purpose of footnote 11 to Section 59-C-5.21(e) was to require that animal boarding places be completely contained inside a building when located in the I-4 zone.⁵ He stated that this is the type of use that would generate noise that could be disturbing to neighbors, and that there is concern about that noise. He argued that if exterior runs were allowed at an animal boarding place [as that use is permitted in the I-1 and I-4 zones], there would be no reason for footnote 11, which says "when in a **building...**" (emphasis added). He argued that if exterior runs were considered accessory to an animal boarding place, again, the use would simply be "permitted," and footnote 11, clarifying when the use is permitted, would be

³ Appellant's recollection regarding the location of these establishments is confirmed by Exhibit 9 at pages 28-30 (listed as Exhibit 8 in Appellant's Table of Hearing Exhibits, and entitled "Zoning maps depicting the zoning of comparative properties"), which contains three zoning vicinity maps, two from the City of Rockville (which is not subject to the Montgomery County Zoning Ordinance), and a third from Montgomery County, showing a transit-oriented (TOMX-2) zone, as well as TOMX-2/TDR, PD-2, R-90 and R-200 zones. The Board notes that none of these three maps indicates where the (allegedly) comparative boarding place is located on the map, and none depicts an area subject to the Montgomery County Zoning Ordinance and zoned I-1 or I-4.

⁴ Pursuant to a question from the Board, counsel for DPS testified that the DPS fence permit reviewers do not consider the purpose of the fence, but rather check to make sure it meets height and location requirements.

⁵ This footnote also applies to animal boarding places located in the I-1 zone.

unnecessary. He argued that the purpose of the footnote 11 is to make clear that in the I-1 and I-4 zones, the use of animal boarding place is an indoor use only. He noted that he knows of no animal boarding places which are completely contained outdoors, and that where the use of animal boarding place is permitted by special exception, the special exception criteria contain specific restrictions on when, where, and if the dogs can be outdoors.⁶

2. Mr. Richard Fischman stated that he believes that the Zoning Ordinance is crystal clear (presumably meaning that Section 59-C-5.21(e) does not permit outdoor exercise areas in connection with animal boarding places in the I-4 zone).
3. Mr. Ronald Bolt argued on behalf of the Appellant. Mr. Bolt stated that the issue in this case is whether an animal boarding place in the I-4 zone can make use of an outdoor exercise area. He argued that footnote 11 to Section 59-C-5.21(e) does not prohibit outdoor exercise areas, which he suggested were customarily accessory to animal boarding places. He stated that the definition of “animal boarding place” set forth in Section 59-A-2.1 of the Zoning Ordinance includes “buildings or land,” and thus he argued envisioned a “place,” not a “building.”⁷ He stated that an accessory use is customarily incidental and subordinate to a principal use, and can be on the same lot (as opposed to in the same building). He argued that if the Council had intended to preclude exterior runs, they could have included express language to that effect. He stated that where animal boarding places are permitted as special exception uses, there is express language to prohibit exterior runs and exercise yards in commercial and transit zones, but not in industrial zones.⁸ He argued that exterior exercise areas are expressly prohibited in commercial and transit zones because they would have otherwise appeared, since he argued it was fair to infer that outdoor exercise areas are customarily incidental to animal boarding places. He noted that the special exception provisions applicable to animal boarding places in residential zones do not expressly say that exterior exercise areas are

⁶ These restrictions vary by zone. See Section 59-G-2.02 of the Zoning Ordinance, reproduced in part in the footnotes below.

⁷ Section 59-A-2.1 defines “Animal boarding place” as follows: “Any buildings or land, other than a veterinary hospital, used, designated or arranged for the boarding, breeding or care of dogs, cats, pets, fowl or other domestic animals for profit, not including those animals raised for agricultural purposes.”

⁸ Section 59-G-2.02, governing special exceptions for animal boarding places, provides in relevant part that “(a) In any central business district, commercial, or transit station zone where permitted by special exception, an animal boarding place must comply with the following conditions and requirements:

(1) Exterior runs, exercise yards, or other such facilities for the keeping of animals are not permitted.

(2) All interior areas for the keeping of animals must be soundproofed.”

Pursuant to Section 59-C-5.21(e), there are no industrial zones in which animal boarding places are allowed by special exception. See Section 59-C-5.21

permitted in those zones, but rather presume that such outdoors areas are permitted, and place conditions on their use.⁹

Mr. Bolt argued that in referring to a building which is sufficiently insulated, footnote 11 refers to the boarding aspect of the use (i.e., the actual housing of the animals), not to the use as a whole, and that this footnote does not exclude outdoor exercise areas. He argued that the purpose of this footnote is to impose a condition that the building be insulated. He argued that other provisions in the Zoning Ordinance which pertain to animal boarding places require soundproofing of the building while at the same time specifically

⁹ See Section 59-G-2.02(b) of the Zoning Ordinance (reproduced below):

(b) In any residential or rural zone where permitted by special exception, an animal boarding place must comply with the following conditions and requirements:

- (1) The minimum lot size is 2 acres or the minimum required in the zone, whichever is greater.
- (2) Exterior areas used to exercise, walk, or keep animals must be set back from any property line a minimum of 200 feet and screened from adjacent residential properties. All exterior exercise areas and runs must be fenced for the safe confinement of animals.
- (3) For all buildings in which animals will be present, maximum expected interior sound levels must be reduced to 40 dBA (A-weighted decibels) outside, measured at ten feet from the structure.
- (4) All buildings and accessory structures must be set back from any property line a minimum of 75 feet.
- (5) No animal may be outdoors between 6 p.m. and 8 a.m.
- (6) On weekdays, the sound at the nearest receiving property line must not exceed 60 dBA between the hours of 8 a.m. to 6 p.m. and 50 dBA between the hours of 6 p.m. to 8 a.m. On Saturdays, Sundays, and federal holidays, the sound at the nearest receiving property line must not exceed 60 dBA between the hours of 9 a.m. to 6 p.m. and 50 dBA between 6 p.m. and 9 a.m. Terms are defined in accordance with the Montgomery County Noise Ordinance (Chapter 31B of the Montgomery County Code). In any event, the predicted maximum receiving property line sound levels must not exceed the characteristic ambient sound levels by more than 3 dBA at any time.
- (7) Dogs must not be walked or exercised in outdoor areas that are off-site.
- (8) In addition to the submittal requirements in Sec. 59-A-4.22, the applicant must submit the following information. Applications submitted without this information are incomplete and will not be accepted or assigned a case number:
 - (i) acoustical engineering studies that demonstrate that the proposed use meets the standards in Sec. 59-G-2.02(b)(3) and (6) above. The studies must show the worst scenario sound level. The statement of operations must be sufficiently detailed to allow determination of how often the worst scenario sound level occurs.
 - (ii) detailed floor plans that show all the interior areas, including runs and kennels, and
 - (iii) site plans that show the layout of all exterior areas used to exercise, walk, or keep animals.
- (9) The board must specify a minimum number of off-street parking spaces equal at least to the number of employees on the maximum shift plus three. The required number of parking spaces must in no case be less than 3.
- (10) The Board may regulate hours of operation. The Board may also regulate the number of animals that may be boarded, exercised, walked, or kept in runs or similar areas, and the manner in which animals are boarded, exercised, walked, or kept.
- (11) Any accessory operation, such as grooming or the sale of pet food and supplies, must be set forth in the statement of operations and must be limited as an accessory activity to a percentage of sales not to exceed 20%.
- (12) All litter and animal waste must be contained and controlled on the site.
- (13) If the proposed use is located in an area that uses well water and septic facilities, the applicant must prove that the use will not have any negative effect.

excluding outdoor exercise areas. See footnote 7 (setting forth the text of Section 59-G-2.02(a)). He stated that animal boarding places are a permitted use only in the C-3, I-1, and I-4 zones. He stated that in the C-3 zone, Section 59-C-4.2 of the Zoning Ordinance requires that a building containing an animal boarding place be “soundproofed,” which he stated is a higher standard than “insulated.”¹⁰ He stated that this Property is located in an industrial zone, and that there is an expectation that there will be noise in an industrial zone. He stated that Dogtopia is trying to be a good neighbor, and asked that the Board reverse DPS.

CONCLUSIONS OF LAW

1. Section 8-23 of the Montgomery County Code authorizes any person aggrieved by the issuance, denial, renewal, or revocation of a permit or any other decision or order of DPS to appeal to the County Board of Appeals within 30 days after the permit is issued, denied, renewed, or revoked, or the order or decision is issued. Section 59-A-4.3(e) of the Zoning Ordinance provides that any appeal to the Board from an action taken by a department of the County government is to be considered *de novo*. The burden in this case is therefore upon the County to show that the Notice of Violation was properly issued.
2. Section 59-A-2.1 of the Zoning Ordinance defines “Animal boarding place” as follows: “Any buildings **or** land, other than a veterinary hospital, used, designated or arranged for the boarding, breeding or care of dogs, cats, pets, fowl or other domestic animals for profit, not including those animals raised for agricultural purposes.” (emphasis added). The Board finds that the wording of this definition is flexible enough to encompass the use of buildings, land, or both for animal boarding places, as appropriate under the provisions governing this use in the various zones in which this use is permitted as of right or by special exception, and notes that this use, as defined, does not necessarily entail the utilization of both “buildings **and** land.” Thus the Board concludes that an animal boarding place that is completely contained within a building would still meet the Zoning Ordinance definition of “Animal boarding place.” This is consistent with testimony from DPS stating that it is not unusual to have an animal boarding place housed completely indoors.
3. Section 59-C-5.21(e) and footnote 11 to that Section provide that animal boarding places are a permitted use in the I-4 zone “[w]hen in a **building** that is insulated sufficiently to prevent interior noise from reaching any neighboring use.” (emphasis added). The Board finds that the quoted language, which comprises footnote 11 to Section 59-C-5.21 and conditions this permitted use, should be read as requiring that this use, when located

¹⁰ Footnote 21 to Section 59-C-4.2(e) (establishing animal boarding places as a permitted use in the C-3 zone) reads “When in a soundproof building.”

in the I-4 zone, be contained “in a building.” The Board further finds that the language of footnote 11 clearly evidences a concern about the impact of the noise generated by an animal boarding place on neighboring properties. The Board notes that its interpretation of footnote 11 as permitting animal boarding places in the I-1 and I-4 zones only “when in a building,” and consequently as prohibiting outdoor exercise areas, addresses this concern about noise, and is consistent with the intent of footnote 11.

4. Appellant argued that an outdoor exercise area should be considered an accessory use to the primary use of animal boarding facility. An accessory use is defined by Section 59-A-2.1 of the Zoning Ordinance as a use which is (1) customarily incidental and subordinate to the principal use of a lot or the main building, and (2) located on the same lot as the principal use or building.

While Appellant did assert that three nearby animal boarding places had outdoor exercise areas, and provided pictures thereof, Appellant did not provide information regarding the precise location of, and thus conclusive information regarding the zoning of, these allegedly comparative properties. The Board concludes, based on the testimony of Mr. Schlegel and the zoning vicinity maps submitted by Appellant, that two of the three establishments are subject to the zoning restrictions of the Rockville City Code (and thus are not regulated by the Montgomery County Zoning Ordinance), and that the third, while subject to the Montgomery County Zoning Ordinance, is located in a transit-oriented, mixed use zone (TOMX-2), in which animal boarding places are only allowed by special exception.¹¹ Thus the Board finds that the animal boarding establishments cited as comparative by Appellant are not subject to the provisions of the Montgomery County Zoning Ordinance regarding animal boarding places in the (I-1 or) I-4 zone.

Similarly, the Board finds that the references made by Mr. Fischman to nearby boarding facilities that did not have outdoor exercise areas indicate that those facilities were either connected to veterinary clinics or were in commercial areas. Based on this testimony, the Board concludes that these facilities were not subject to the Zoning Ordinance provisions regarding animal boarding places in the (I-1 or) I-4 zone.¹²

As previously noted by counsel for the Appellant and by counsel for DPS, and as acknowledged above by the Board, the restrictions placed by the

¹¹ See Section 59-C-13.22(d) of the Zoning Ordinance.


¹² While it is conceivable that the areas that Mr. Fischman referred to as “commercial areas” were, in fact, zoned as industrial areas, Mr. Fischman has not provided any specifics regarding the nature or locations of these boarding facilities other than to say they were within a two mile radius of Dogtopia, and thus the Board cannot find that these facilities were subject to the Zoning Ordinance provisions applicable to animal boarding places in the (I-1 or) I-4 zone.

Zoning Ordinance on outdoor exercise areas at animal boarding facilities vary by zone. These areas are regulated in some zones and expressly prohibited in others. Given the disparate yet specific treatment and varying legality accorded these outdoor exercise areas in different zones, the Board cannot consider the entire universe of animal boarding places when determining whether or not an outdoor exercise area is “customarily incidental and subordinate to” the use of animal boarding place, but rather can only consider a subset of similarly situated animal boarding places, i.e., those permitted by right and located in the I-1 or I-4 zone, and thus subject to footnote 11 to Section 59-C-5.21. Appellant has failed to provide any evidence to show that other animal boarding places which were located in the I-1 or I-4 zone (and thus were subject to footnote 11 to Section 59-C-5.21) had outdoor exercise areas. Thus this Board is unable to conclude based on the evidence presented that such areas are customarily incidental and subordinate to the animal boarding places permitted in the I-1 or I-4 zones, and is not persuaded by Appellant’s argument that they should be considered accessory uses.

5. Based on the foregoing, the Board concludes that DPS properly interpreted Section 59-C-5.21 of the Zoning Ordinance and its corresponding footnote 11 to require that dogs boarded at an animal boarding place located in the I-4 zone are not permitted outside of the (sound-insulated) building. Thus, in light of undisputed evidence that dogs were allowed outside at the subject Property, the Board finds that DPS has met its burden of demonstrating by a preponderance of the evidence that the Notice of Violation dated January 30, 2007, regarding the operation of an animal boarding place outdoors, was properly issued. The appeal in Case A-6205 is therefore **DENIED**.

On a motion by Member Catherine G. Titus, seconded by Vice Chairman Donna L. Barron, with Chair Allison I. Fultz in agreement, and Members Wendell M. Holloway and Caryn L. Hines necessarily not participating, the Board voted 3 to 0 to adopt the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the Opinion stated above be adopted as the Resolution required by law as its decision on the above-entitled petition.



Allison I. Fultz
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 23rd day of August, 2007.

Katherine Freeman
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 2-A-10(f) of the County Code).

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.